Preface

[W]hile industrial economics is highly developed as an academic discipline, application of economic theories and models in concrete cases remains an area fraught with difficulty and uncertainty¹

Justice Bo Vesterdorf, President of the European Court of First Instance
(1998–2007)

Economics is on the ascendancy in European competition policy. In the past two decades economics has featured increasingly in policy discourse and in the official documents, notices and guidelines of both European Union institutions and Member States. Correspondingly, economic consultancies have flourished during this time, and new interdisciplinary academic centres and institutes have been established devoted to the study of competition law and economics. At the European Commission, a number of telling changes have occurred, including the appointment of a professor of economics as Commissioner of the European competition directorate, and the establishment of a Chief Competition Economist position. The rise of economics seems likely to continue as politicians and policymakers continue to call for the use of ‘more economics’ in European competition policy including the greater reception of economic concepts, theories and instruments in competition law enforcement.

There remain, however, a number of practical tensions and difficulties associated with translating these high-level policy ambitions into day-to-day enforcement practice; a point highlighted all too well by recent decisions of the European courts. In the words of Justice Vesterdorf above the application of economics in real-world cases remains ‘fraught with difficulty’.

Against this background, it is the purpose of this book to take a step back from the general policy push for ‘more economics’, and to focus instead on exploring why it is that the relationship between economics and competition law enforcement can appear fraught. In doing so, it rejects the more simplistic explanations that decision-makers do not listen to economists and that, as a result, ‘the economics’ is systematically being incorrectly applied (as is sometimes said by economists), or that economics is simply too indeterminate

¹ B. Vesterdorf ‘Standards of proof in merger cases: reflections in the light of recent case law of the Community Courts’ (paper presented at the BIICL third annual merger control conference, 6 December 2004) 14.

to be applied in practice (as is sometimes heard from lawyers). Rather, it is argued that the use of economics in enforcement settings reflects a complex matrix of factors including the nature of economics, its multiple users in the enforcement process, and the characteristics and complexities of the enforcement setting in which it is sought to be applied.

This work has relatively humble origins. Its original scope was an examination of how, and in what ways, the mass of accumulated economic knowledge relating to tacit collusion was reflected in the enforcement decisions of the European competition authorities. It became immediately clear, however, that the process of transformation of economic ideas and knowledge into everyday enforcement practice was less straightforward – and more interesting – than I had initially (and perhaps naïvely) assumed. Accordingly the research broadened to an examination of two key empirical questions. First, the extent to which economics has *in fact* been influential in the enforcement of European competition law, and second, *in what way* precisely economics contributes to the enforcement process.

Although there is a significant body of normative economic literature on how economics should be used in competition law enforcement, and extensive legal commentary on specific cases, there is very little research in the European context that had sought to systematically examine how economics is used in practice by the different actors and institutions involved in European competition law enforcement.

This book seeks to fill this gap by providing much-needed empirical content to a number of specific questions regarding economics and enforcement such as: what precisely do we know about how economics contributes to the day-to-day enforcement activity of the European competition institutions? How are various contextual or institutional factors likely to impact on the ability for economics to have a more prominent role in the future enforcement of competition law in Europe? What is the role of sophisticated economic modelling vis-à-vis other economic evidence in the enforcement process? What standard do the courts apply when reviewing economic evidence? These issues are examined within the broader context of the relationship between expert knowledge and its practical application. In this respect, the book canvasses important questions regarding the manner in which economic knowledge, which is generated in one area, can be applied in another area with substantively different purposes and audiences. In considering all these questions, through a grounded examination of enforcement practice, it is the aim of this book to foster a more realistic and productive debate about the use, and potential use, of economics in competition law enforcement.

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